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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KIRBY SPENCER, individually and on behalf of all others similarly situated,	)	CASE No. 2:14-cv-01136-RFB-(PAL)
	)	
Plaintiff,	)	<b>DEFENDANT AT&amp;T DIGITAL LIFE, INC.'S</b>
	)	<b>SECOND MOTION FOR SUMMARY</b>
v.	)	<b>JUDGMENT</b>
	)	
AT&T DIGITAL LIFE, INC., a foreign corporation doing business in Nevada,	)	<b>ORAL ARGUMENT REQUESTED</b>
	)	
Defendant.	)	

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**NOTICE OF MOTION FOR SUMMARY JUDGMENT**

Defendant AT&T Digital Life, Inc. ("AT&T") hereby moves the Court for summary judgment on Plaintiff Kirby Spencer's claim for relief under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*

This Second Motion for Summary Judgment is made pursuant to Fed. R. Civ. P. 56 and this Court's September 3, 2015 Minute Order, which denied without prejudice AT&T's original motion for summary judgment and ordered that AT&T may file another motion for summary judgment after the First Amended Complaint and responsive pleading have been filed. (Doc. No. 50). This motion is based upon the accompanying Memorandum of Law; the Declarations of Joel D. Smith, Alejandro Olea and Homi Torab, together with the exhibits attached thereto; the supporting Request for Judicial Notice; all the pleadings and other papers in this action; and such other written and oral arguments as may be presented to the Court.

Dated: November 25, 2015

/s/

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Kirby Spencer has sued Defendant AT&T Digital Life, Inc. (“AT&T”) for alleged violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.* The TCPA was enacted in 1991 to curb abusive “telemarketing calls.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). This lawsuit, however, has nothing to do with telemarketing calls. Instead, Mr. Spencer is seeking to exploit the TCPA to recover a \$2.7 million jackpot in statutory penalties because he inadvertently received—on a five-dollar, disposable cell phone that he seldom used—emergency text alerts that the previous user of his cell phone number had requested.

This lawsuit is one of nearly a dozen TCPA lawsuits filed by Mr. Spencer in this District, many of which demanded substantial amounts of money based on allegations that he received an unusually high number of texts or calls. Mr. Spencer made this and other lawsuits possible by purchasing up to fifteen disposable “Tracfone” cell phones in 2014, knowing that he could sue for statutory penalties if he received calls that were intended for individuals who previously used one of the cell phone numbers. Mr. Spencer seldom used his disposable cell phones, if at all, other than for the purpose of enabling a lawsuit.

This particular lawsuit arose after Mr. Spencer activated one of his cell phones in May 2014, and began receiving text alerts generated by an AT&T Digital Life home security and monitoring system, although he was not a Digital Life customer. A key feature of the Digital Life system is that customers can program and activate individualized text alerts that provide, in virtually real-time, warnings when home intrusion sensors in their homes detect activity. Here, Mr. Spencer received text alerts because a Digital Life customer (who is not a party to this case) had previously set up her Digital Life system to send text alerts whenever her front door or kitchen door opened, but later changed the phone number she had provided without updating her contact information and text preferences in the system. After the customer’s phone number was reassigned to one Mr. Spencer’s many cell phones, Mr. Spencer received text alerts that were



1 intended for the AT&T customer.

2       Notwithstanding Mr. Spencer's alleged complaints to AT&T about the texts, he did not  
3 attempt to block the texts, did not ask his wireless service company to assign him a different  
4 phone number, and did not simply use one of his many other disposable cell phones (assuming  
5 that he had such a need). Instead, he waited for the text alerts to accumulate, and then filed this  
6 lawsuit seeking millions of dollars unrelated to any alleged harm that he experienced.

7 Mr. Spencer's claim under the TCPA, however, fails as a matter of law for three separate and  
8 independent reasons:

9       First, the TCPA does not prohibit all automated calls or texts. Instead, it only regulates  
10 calls and texts made by a specific type of telephone equipment commonly used by telemarketers,  
11 *i.e.*, automated dialers that can randomly or sequentially generate phone numbers to be called.  
12 Hence, to show a violation of the TCPA, a plaintiff must prove that the texts he received on his  
13 cell phone were sent via an "automatic telephone dialing system" ("ATDS"), a term narrowly  
14 defined by the statute as equipment that has the capacity to store or produce telephone numbers to  
15 be called, "using a random or sequential number generator, and . . . to dial such numbers." 47  
16 U.S.C. § 227(a).

17       Here, AT&T's system is incapable of random or sequential number generation, and  
18 sending text alerts to random or sequential cell phone numbers makes no sense in the context of  
19 the Digital Life service, which is designed to provide individualized, real-time alerts to customers  
20 about events happening in their homes. Indeed, Mr. Spencer does not contend that AT&T's  
21 system has the requisite number generation capacity. Instead, he argues that the term "ATDS"  
22 includes any system that can dial numbers without human intervention, irrespective of its ability  
23 to generate numbers. Even if that interpretation had legal merit (it does not), the Digital Life  
24 system does not meet that definition either. Human intervention is necessary because: (a) Digital  
25 Life customers control who receives texts, when texts are sent, and under what circumstances  
26 they are sent; and (b) no text is sent unless someone does something in a Digital Life-equipped  
27 home that triggers a text alert, such as open a door or window.

28

1        Second, Section 227(b)(1)(A)(iii) of the TCPA imposes liability on the person that  
 2        “makes” the call. On July 10, 2015, the FCC issued an order clarifying that where, as here, a  
 3        company provides an application that allows consumers to control whether and under what  
 4        circumstances a text is sent, and who receives the text, it is the consumer, not the company, that is  
 5        deemed to have made the call. As the FCC explained, such applications differ from the  
 6        telemarketing “calling campaigns” that the TCPA is intended to curb. *See In the Matter of Rules*  
 7        *& Regs. Implementing the TCPA*, 30 F.C.C. Rcd. 7961, 7982, ¶32 (July 10, 2015).

8        Third, the TCPA expressly permits calls and texts that are made for “emergency  
 9        purposes.” FCC-promulgated regulations define the term “emergency purposes” to mean “any  
 10        situation affecting the health and safety of consumers” (47 C.F.R. § 64.1200(f)(4)), and the FCC  
 11        has instructed that the term is to be broadly construed. Here, the home security services provided  
 12        by AT&T are called “Life Safety Services,” and the undisputed facts establish that the text alerts  
 13        that Mr. Spencer received were part of those services. The sole purpose of the text alerts was to  
 14        warn the Digital Life customer that home security sensors in her home had detected that the front  
 15        door or kitchen door had been opened. Indeed, Mr. Spencer’s own expert repeatedly  
 16        acknowledged that the text alerts at issue warned of “security events” and “breaches” of security.  
 17        By their very nature, home security system warnings concern the safety of consumers, and thus  
 18        the text alerts were sent for “emergency purposes.” It is undisputed that AT&T had no other  
 19        purpose in sending the text alerts, and that this case is not about telemarketing.

## 20        **II. FACTUAL BACKGROUND**

### 21        **A. AT&T Digital Life Provides Home Security And Monitoring Services,** 22        **Including Individualized, Real-Time Text Alerts That Warn Customers** 23        **When Home Security Sensors Are Activated.**

24        AT&T Digital Life is an all Internet-Protocol based wireless home security and  
 25        monitoring service. (Declaration of Alejandro Olea (“Olea Decl.”), ¶¶ 4, 6 [Ex. 1 to Smith  
 26        Decl.]; *see* First Amended Complaint (“FAC”), ¶¶ 8, 11 [Ex. 10 to Smith Decl.].<sup>1</sup>) The Digital

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27        <sup>1</sup> All exhibits cited herein are attached to the Declaration of Joel D. Smith in Support of  
 28        AT&T Digital Life Inc.’s Second Motion for Summary Judgment (“Smith Decl.”).

1 Life system includes many typical professional monitoring and home security features, such as  
 2 alarms, smoke detectors, motion sensors, and sensors that detect when doors and windows are  
 3 opened. (Olea Decl., ¶ 6 [Ex. 1 to Smith Decl.]; Digital Life website screenshots (ATT000078-  
 4 81) [Ex. 4 to Smith Decl.]) Collectively, the Digital Life home security and professional  
 5 monitoring services are called “Life Safety Services.” (Olea Decl., ¶ 6 [Ex. 1 to Smith Decl.];  
 6 Digital Life User Guide, at p. 1 (ATT000016) [Ex. 3 to Smith Decl.]) AT&T’s website likewise  
 7 emphasizes the “safety and security features” of the Digital Life system. (Digital Life website  
 8 screenshots (ATT000079) [Ex. 4 to Smith Decl.]; Olea Decl., ¶ 7 [Ex. 1 to Smith Decl.])

9 The Life Safety Services provided by the Digital Life system are supported by several  
 10 high-tech features. Using a computer or wireless device, Digital Life customers can remotely  
 11 manage their home security and monitoring devices by logging on to a password-protected,  
 12 online account management application (“online tool”) provided to Digital Life customers. (Olea  
 13 Decl., ¶ 8 [Ex. 1 to Smith Decl.]) Customers can log on and use the online tool, for example, to  
 14 remotely view video feeds of their homes, arm or disarm alarms, or to monitor door, window and  
 15 motion sensors. (*Id.*)

16 One of the key features of the online tool is that customers can use it to program the  
 17 system to send “text alerts” that provide instant notifications when a security sensor in the  
 18 customer’s home is activated. (Olea Decl., ¶ 9 [Ex. 1 to Smith Decl.]; FAC, ¶ 11 [Ex. 10 to  
 19 Smith Decl.]) The text alerts describe what event has happened in the home, such as a security  
 20 sensor detecting a front door or window opening, and indicate the time that the event occurred.  
 21 (Olea Decl., ¶ 9 [Ex. 1 to Smith Decl.]; *see also* Example Text Alerts [Ex. 5 to Smith Decl.];  
 22 Smith Decl., ¶ 6.) The text alerts also instruct customers to go to the online tool to obtain more  
 23 information about the event described in the text alert. (Olea Decl., ¶ 9 [Ex. 1 to Smith Decl.];  
 24 Example Text Alerts [Ex. 5 to Smith Decl.])

25 AT&T refers to these text alerts as “customer-defined” texts because customers, not  
 26 AT&T, determine when and under what circumstances text alerts are sent. (Olea Decl., at ¶¶ 10-  
 27 11 [Ex. 1 to Smith Decl.]) Each Digital Life text alert sent by AT&T’s system is unique, because  
 28

each text describes a particular event in a particular Digital Life-equipped home, and is sent only to the cell phone number specified by the Digital Life customer. (*Id.* at ¶ 11; Torab Depo., 77:18-78:6 [Ex. 17 to Smith Decl.].) Text alerts are not sent *en mass* to consumers and are not used to promote products or services. (Olea Decl., at ¶ 12 [Ex. 1 to Smith Decl.].) Their sole purpose is to warn Digital Life customers about events happening in their homes, such as the activation of a home security sensor. (*Id.*) The text alert feature is very popular among Digital Life customers, and within its first year, the Digital Life service expanded to seventy-five markets in the United States and won the Best Consumer Mobile Service award at the Mobile World Congress in February 2014. (*Id.* at ¶ 13.)

**B. AT&T's System Does Not Have The Capacity To Generate Random Or Sequential Numbers To Be Called.**

AT&T's system does not have (and has never had) the capacity to produce or store numbers to be called, using a random or sequential number generator, and to call those numbers. (Declaration of Homi Torab ("Torab Decl."), ¶ 16. [Ex. 2 to Smith Decl.]; *see also id.* at ¶ 4.) The only way that cell phone numbers can be generated and stored is when a sales associate manually enters a Digital Life customer's number into the system at the point of sale, or if a Digital Life customer manually enters a number in the online account management tool, and the system can only call those numbers. (*Id.*) AT&T would have to replace its current hardware and software with a new system in order to have the ability to generate or store random or sequential numbers, and to call those numbers. (*Id.* at ¶ 17.) Doing so, however, would make no sense, because the purpose of providing individualized, real-time information to Digital Life customers is to alert them about security events happening in their homes. (*Id.*)

**C. AT&T Digital Life's System Can Generate And Send Text Alerts Only Through Human Intervention—The System Cannot Send Text Alerts Any Other Way.**

By default, when AT&T Digital Life equipment is first installed in a customer's home, the system is incapable of sending text alerts to the customer about events happening in his or her home. (Torab Decl., ¶ 6 [Ex. 2 to Smith Decl.].) Customers only receive text alerts if they access the online tool described in Section II.A above and activate the text alert feature. To do so,

customers must use the online tool to create one or more “programs” that control when the system will send a text alert, and who will receive it. (*Id.*; Olea Decl., ¶ 13 [Ex. 1 to Smith Decl.].) That process requires the customer to manually complete four steps:

- **First**, the customer must access the online tool and enter his or her unique Digital Life user ID and password. By doing so, the customer obtains access to his or her account information and can set individualized text preferences or discontinue text alerts. (Torab Decl. ¶ 7 [Ex. 2 to Smith Decl.]; Log-in Screen (ATT000164) [Ex. 7 to Smith Decl.].)
- **Second**, using fields available on the online tool, the customer must specify which event will prompt AT&T’s system to generate and send a text alert, such as a door or window opening. The system cannot generate and send text alerts unless and until the customer specifies the event that will prompt a text alert. (Torab Decl. ¶ 8 [Ex. 2 to Smith Decl.]; *see* also Set Up Notifications/ Select Where to Send Screen (ATT000410) [Ex. 8 to Smith Decl.].)
- **Third**, after selecting what event will trigger a text alert, the customer must then go to a screen titled “Select Where to Send.” By default, the customer will see the phone number and email that he or she provided to AT&T when the customer purchased the Digital Life system (the phone number and email information is manually input by a sales associate at the point of sale). Next to the phone number and email are check boxes, and the system can send alerts by email, text or both depending on which check boxes the customer clicks. The system will send a text alert only if the customer clicks on the check box next to the phone number in the “Select Where to Send” screen, and will only send a text alert to the phone number shown on that screen.<sup>2</sup> (Torab Decl. ¶ 9 [Ex. 2 to Smith Decl.]; *see* also Set Up Notifications/ Select Where to Send (ATT000411-13) [Ex. 8 to Smith Decl.].)

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<sup>2</sup> If the phone number listed on the “Select Where to Send” screen is no longer the correct number, the customer can manually update his or her correct number in the online tool, and the new number will then replace the old number on the “Select Where to Send” screen. (Torab Decl., at ¶ 10 [Ex. 2 to Smith Decl.].)

- **Fourth**, after completing the above-described steps, the customer must then select a name for the “program” and save it in the system. As part of that process, the customer also must specify when the program will be active and send alerts. For instance, the customer can create one program to send text alerts whenever a window is opened (without any time restriction), and another program to send text alerts if the front door is opened during weekday afternoons. (Torab Decl. ¶ 11 [Ex. 2 to Smith Decl.]; *see* also Name and Save Program Screen (ATT000414-15) [Ex. 9 to Smith Decl.].)

It is undisputed that AT&T’s system will generate and send text alerts to a particular phone number only if the customer manually completes the above four steps, and only if an event happens in the home that the customer specified should prompt a text alert. (Torab Decl., at ¶¶ 12-14 [Ex. 2 to Smith Decl.].) Mr. Spencer admitted in his opposition to AT&T’s first motion for summary judgment that in order to activate text alerts, a Digital Life customer must use the online tool to activate text alerts, choose the cell phone number to which the text messages will be sent and specify the circumstances under which a text will be sent. (Opp’n to First MSJ, at 7:25-8:1 [Ex. 18 to Smith Decl.]; *see also id.* 11:14-16 (“The type of event that would result in a . . . text messaging notification was determined solely by the customer . . .”).

Thus, in order to send text alerts like those that were allegedly received by Mr. Spencer, the system requires two levels of human intervention. (*Id.* at ¶ 15.) First, as described above, a customer must manually log onto the online tool, activate the text alert feature and specify the number to receive the text alert. (*Id.*) Second, somebody in the Digital Life-equipped home must do something to activate a sensor, such as open a door or window. (*Id.*)

**D. In March 2014, An AT&T Digital Life Customer Activated The Text Alert Feature And Set Up The System To Send Text Alerts To 702-496-3387.**

In late February 2014, an AT&T Digital Life customer (who is not a party to this case) purchased a Digital Life system. (Olea Decl., ¶ 14 [Ex. 1 to Smith Decl.]; Customer Service Records (ATT000001) [Ex. 6 to Smith Decl.].) At the time, the customer had given AT&T the phone number 702-496-3387 as her customer contact number. (*Id.*) The Digital Life customer (or someone in her household with access to her account) successfully used the online tool to

1 activate the text alert feature, and on March 14, 2014, AT&T began sending customer-defined  
2 text alerts to the phone number 702-496-3387. (Olea Decl., ¶ 15 [Ex. 1 to Smith Decl.] )

3 **E. Mr. Spencer Inadvertently Received Digital Life Text Alerts After The Phone**  
4 **Number Was Reassigned To Him.**

5 Sometime after the Digital Life customer activated the text alert feature, she stopped using  
6 phone number 702-496-3387. (*Id.* at ¶ 16.) The phone number was later recycled and reassigned  
7 to a disposable “Tracfone” prepaid cell phone which Plaintiff Kirby Spencer purchased at a  
8 Target store for about five dollars. (*Id.*; Spencer Dep., 35:4-24; 74:7-76:1; 78:4-7 [Ex. 12 to  
9 Smith Decl.]; Example Text Alerts [Ex. 5 to Smith Decl.]) However, when the Digital Life  
10 customer stopped using phone number 702-496-3387, she did not use the online tool to  
11 discontinue the text alerts to that number (if she had, then the text alerts would have stopped  
12 immediately). (Olea Decl., ¶ 17 [Ex. 1 to Smith Decl.]) As a result, the text alert feature  
13 remained active and text alerts that were intended for the Digital Life customer inadvertently  
14 continued to be sent to 702-496-3387 after the number was reassigned to Mr. Spencer. (*Id.*)  
15 Each of the text alerts that Mr. Spencer received warned either that the front door or kitchen door  
16 of the Digital Life customer’s home had been opened. (Spencer Depo., 134:1-7 [Ex. 12 to Smith  
17 Decl.]) The text alerts were discontinued after AT&T confirmed with the Digital Life customer  
18 that she no longer was using phone number 702-496-3387, and was able to help her remove the  
19 phone number from her text alert preferences. (Olea Decl., ¶ 18 [Ex. 1 to Smith Decl.] )

20 **F. This Lawsuit Is One Of Nearly A Dozen TCPA Lawsuits Filed By Mr.**  
21 **Spencer To Recover Substantial Penalties Unrelated To Any Alleged Harm.**

22 Mr. Spencer has filed nearly a dozen TCPA lawsuits in this District, many of which seek  
23 substantial statutory penalties for an unusually high number of calls or texts.<sup>3</sup> In this lawsuit, he

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24 <sup>3</sup> *Spencer v. Nationwide Credit, Inc.*, 2:14-cv-02051-JAD-NJK (filed Dec. 8, 2014);  
25 *Spencer v. Security Finance Corp. of Nevada*, 2:14-cv-01914-RFB-PAL (filed Nov. 17, 2014);  
26 *Spencer v. Bluestem Brands, Inc.*, 2:14-cv-01880-RFB-VCF (filed Nov. 10, 2014); *Spencer v.*  
27 *Collection Bureau of America, Ltd.*, 2:14-cv-01863-RFB-CWH (filed Nov. 6, 2014); *Spencer v.*  
28 *MRS BPO, LLC*, 2:14-cv-01833-MMD-GWF (filed Nov. 3, 2014); *Spencer v. Kohl’s Department*  
*Stores*, 2:14-cv-01646-RFB-CWH (filed Oct. 7, 2014); *Spencer v. Wells Fargo Bank, N.A.*, 2:14-  
cv-01648-LDG-GWF (filed October 7, 2014); *Spencer v. Midland Credit Management, Inc.*,  
2:14-cv-01226 (filed July 28, 2014); *Spencer v. Portfolio Recovery Associates*, 2:14-cv-01217-  
(Continued...)



1 is seeking to collect over \$2.7 million in statutory penalties. (Supp. Response to Interrog. No. 1  
 2 [Ex. 15 to Smith Decl.].) The purported actual damages caused by the texts, if any, were so  
 3 inconsequential that Mr. Spencer never bothered to calculate them. (*Id.*; Spencer Depo., 117:17-  
 4 118:9 [Ex. 12 to Smith Decl.].)

5 Mr. Spencer's lawsuits were made possible by the fact that he purchased up to fifteen  
 6 disposable, pre-paid cell phones in 2014, including the phone that received the Digital Life text  
 7 alerts at issue here. (Spencer Depo., 64:24-65:11 [Ex. 12 to Smith Decl.].) Most people use only  
 8 one cell phone, and Mr. Spencer seldom, if ever, used the disposable phones that he purchased  
 9 (including the phone that received Digital Life text alerts). (Spencer Depo., 42:21-43:7; 44:15-  
 10 45:22; 70:2-71:4; 80:11-15 [Ex. 12 to Smith Decl.]; Snyder Depo., 12:21-13:10 [Ex. 13 to Smith  
 11 Decl.].) Mr. Spencer purchased the phones knowing that he might receive calls or texts intended  
 12 for the previous user of the cell phone number and, if he did, his practice in 2014 was to file a  
 13 lawsuit under the TCPA. (*See* Spencer Depo., at 54:21-55:15; 72:25-73:7 [Ex. 12 to Smith  
 14 Decl.].) As a result of this practice, during the same period of time that Mr. Spencer received text  
 15 alerts from Digital Life, he also received hundreds of allegedly unsolicited calls or texts from  
 16 other companies on other disposable cell phones that he had purchased. (*Id.* at 46:15-49:6; 51:15-  
 17 21.) Mr. Spencer testified that he has never heard of anyone who has received as many allegedly  
 18 unsolicited calls or texts as he has, or who has filed as many TCPA lawsuits as he has. (*Id.* at  
 19 56:9-19; 59:4-15.)

### 20 **III. LEGAL STANDARD**

21 Summary judgment is appropriate where "there is no genuine dispute as to any material  
 22 fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary  
 23 judgment procedure is properly regarded not as a disfavored procedural shortcut," but rather as a  
 24 means of securing "the just, speedy and inexpensive determination of every action." *Celotex*  
 25 *Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Once a defendant shows that it is entitled to summary

26 \_\_\_\_\_  
 27 MMD-PAL (filed July 25, 2014); *Spencer v. LTD Financial Servs.*, 2:14-cv-01138-APG-CWH  
 28 (filed July 11, 2014); *Spencer v. AT&T Digital Life, Inc.*, 2:14-cv-01136-RFB-PAL (filed July 10,  
 2014). (Supp. Response To Interrogatory No. 8 [Ex. 15 to Smith Decl.].)



1 judgment, the plaintiff may not refute this showing with conclusory allegations, conjecture, or  
 2 speculation, but must instead “set forth specific facts showing that there is a genuine issue for  
 3 trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation omitted);  
 4 *accord Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 345 (9th Cir. 1995).  
 5 “[T]he mere existence of some alleged factual dispute between the parties will not defeat an  
 6 otherwise properly supported motion for summary judgment; the requirement is that there be no  
 7 genuine issue of material fact.” *Anderson*, 477 U.S. at 247-48. “An issue is ‘genuine’ only if  
 8 there is a sufficient evidentiary basis on which a reasonable fact finder could find for the  
 9 nonmoving party, and a dispute is ‘material’ only if it could affect the outcome of the suit under  
 10 the governing law.” *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008). “If the evidence [in  
 11 opposition to summary judgment] is merely colorable, or is not significantly probative, summary  
 12 judgment may be granted.” *Anderson*, 477 U.S. at 249-50 (citations omitted).

#### 13 IV. ARGUMENT

14 As a matter of law and based on the undisputed facts, Mr. Spencer’s claim under the  
 15 TCPA must be dismissed for three separate and independent reasons. First, the text messages  
 16 were not sent with an automatic telephone dialing system, and thus Mr. Spencer cannot establish  
 17 this necessary element of his claim. Second, AT&T did not “make” the calls at issue; instead, it  
 18 provided an application that allowed its customers to make the calls. Third, the text messages at  
 19 issue are not actionable because they fall within the TCPA’s broad “emergency purposes”  
 20 exception.

##### 21 A. Mr. Spencer’s Claim Fails As A Matter Of Law Because The Text Alerts 22 Were Not Sent Using An Automatic Telephone Dialing System.

23 Section 227(b)(1)(A) does not regulate all automated text messages, but only those that  
 24 are sent with equipment that meets the statutory definition of an “automatic telephone dialing  
 25 system” (“ATDS”). *See* 47 U.S.C. § 227(b)(1)(A). “It is Plaintiff who must show, as an element  
 26 of his claim, that Defendant used an ATDS,” and summary judgment for the defendant is  
 27 warranted where the plaintiff cannot meet that burden. *Burslepp v. Improv Miami, Inc.*, 2012 WL  
 28 4932692 at \*2 (S.D. Fla. Oct. 16, 2012). As set forth more fully below, Mr. Spencer cannot

1 establish the use of an ATDS here for two reasons. First, AT&T's equipment does not meet the  
 2 statutory definition of an ATDS because it does not have the capacity to generate and call  
 3 randomly or sequentially produced numbers, as required by the plain language of the statute.  
 4 Second, although Mr. Spencer argues that the term "ATDS" includes any system that dials  
 5 numbers without human intervention (regardless of its capacity to generate numbers), that  
 6 interpretation is inconsistent with the plain language of the TCPA and, in any event, the  
 7 undisputed facts establish that AT&T's equipment does not and cannot dial numbers without  
 8 human intervention.

9  
 10 **1. AT&T's System Does Not Meet The Statutory Definition Of An ATDS  
 Because It Cannot Generate Random Or Sequential Telephone  
 Numbers To Be Called.**

11 The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce  
 12 telephone numbers to be called, using a random or sequential number generator; and (B) to dial  
 13 such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). The plain terms of the statute provide  
 14 that equipment qualifies as an ATDS only if it has the capacity to generate random or sequential  
 15 numbers to be called. *Id.* "Random number generation" means random sequences of 10 digits,  
 16 and sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so  
 17 on." *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (internal  
 18 quotation omitted). Moreover, numerous authorities confirm that the definition of the term  
 19 "ATDS" turns on whether the equipment has the requisite number generation capacity.

20 First, the Ninth Circuit held in *Satterfield* that the statutory definition of the term "ATDS"  
 21 is clear and unambiguous, and that courts must give effect to every word in the definition.  
 22 *Satterfield*, 569 F.3d at 951; *see also U.S. v. Caceres-Olla*, 738 F.3d 1051, 1056 (9th Cir. 2013)  
 23 ("It is our duty to give effect, if possible, to every clause and word of a statute"). Hence, as  
 24 explained in *Satterfield*, an ATDS is equipment that has the "capacity" to "store, produce, or call  
 25 randomly or sequentially generated telephone numbers." *Satterfield*, 569 F.3d at 951. Although  
 26 equipment need not necessarily be used in practice for the purpose of generating random or  
 27 sequential numbers to be called, the statute requires that it have that "capacity" in order to qualify  
 28

1 as an ATDS. *Id.*

2 Second, the FCC likewise emphasizes the number generation capacity requirement. The  
3 definition of an “ATDS” in the FCC’s implementing regulations copies nearly verbatim the  
4 statutory definition of an ATDS, including the random or sequential number generation capacity  
5 requirement. *See* 47 C.F.R. § 64.1200(f)(2) (effective Oct. 16, 2013) (“The terms [ATDS] and  
6 autodialer mean equipment which has the capacity to store or produce telephone numbers to be  
7 called using a random or sequential number generator and to dial such numbers”). Similarly, a  
8 2014 FCC Consumer Guide explained, “[a]utodialers can produce, store and dial telephone  
9 numbers using a random or sequential number generator.” FCC, *Consumer Guide: Unwanted*  
10 *Telephone Calls* (Oct. 8, 2014) (“FCC Consumer Guide”) [Ex. 11 to Smith Decl. and Ex. A to  
11 Request for Judicial Notice (“RJN”).]

12 Equally important, the FCC confirmed the number generation capacity requirement in a  
13 2012 Order, and in its most recent July 10, 2015 Order addressing the definition of the term  
14 ATDS. In its 2012 Order, the FCC stated that it “emphasized that this definition [of an ATDS in  
15 Section 227(a)(1)] covers any equipment that has the specified capacity to generate numbers and  
16 dial them without human intervention,” even if that capacity is not used in practice. *In the Matter*  
17 *of Rules & Regs. Implementing the TCPA*, 27 F.C.C. Rcd. 15391, 15392 ¶ 2 n.5 (Nov. 29, 2012)  
18 (emphasis in original) (“2012 FCC Order”). Similarly, on June 18, 2015, the FCC issued a press  
19 release stating that it would soon issue an order “affirming the law’s definition of an autodialer,”  
20 and once again emphasized that an ATDS is “defined in in the [TCPA] as any technology with  
21 the capacity to dial random or sequential numbers.” (June 18, 2015 Press Release [Ex. 19 to  
22 Smith Decl. and Ex. B to RJN].) The FCC subsequently issued its order on July 10, 2015,  
23 wherein the FCC cited the statutory definition of the term “ATDS” and explained that the  
24 definition focuses on the “‘capacity’ to dial random and sequential numbers, even if it is not  
25 presently used for that purpose.” *In the Matter of Rules & Regs. Implementing the TCPA*, 30  
26 F.C.C. Rcd. 7961, 7972 ¶10 (“2015 FCC Order”). The FCC further explained that “there must be  
27 more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’  
28

1 [i.e., “ATDS”] definition.” *Id.* at ¶ 18; *see also id.* at ¶16 (a “mere theoretical modification . . . is  
2 insufficient to sweep [equipment] into our interpretation of ‘capacity.’”).

3 Third, Congress could have drafted the statute to restrict all automated calls or texts to  
4 wireless cell phone numbers but it did not do so. When it defined the term “ATDS,” Congress  
5 was concerned that by using equipment that generated random or sequential numbers,  
6 telemarketers could reach unlisted numbers, hospitals and emergency services, or disrupt  
7 businesses who receive sequentially-dialed calls. *See* 137 Cong. Rec. H11307-01, 1991 WL  
8 250340, at \*11310 (Nov. 26, 1991) (“automatic dialing machines place calls randomly, meaning  
9 they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing  
10 public safety problems”); S. Rep. No. 102-178, 1991 WL 211220, at \*2 (Oct. 8, 1991) (the TCPA  
11 seeks to prevent telemarketers from “dial[ing] numbers in sequence, thereby tying up all the lines  
12 of a business and preventing outgoing calls”). At the same time, however, Congress did not want  
13 to inhibit “expected or desired communications between businesses and their customers.” H.R.  
14 Rep. 102-317, 1991 WL 245201, at \*17 (Nov. 15, 1991). Congress thus confined potential  
15 TCPA claims to calls involving specialized equipment used by telemarketers that is capable of  
16 randomly or sequentially generating and dialing telephone numbers, thereby ensuring that not  
17 every automated call or text to a cell phone becomes a potential federal case.

18 Fourth, in light of the above authorities, courts have held that dismissal for the defendant  
19 is proper where, as here, the defendant’s equipment lacks the required number generation  
20 capacity. *Gragg*, for example, involved an automated text messaging system used by taxi  
21 companies. *Gragg*, 995 F. Supp. 2d at 1194. After a customer called to request a taxi cab, the  
22 dispatcher manually entered the customer’s phone number into the system, which then  
23 transmitted a text message to that customer with customer-specific information about the request,  
24 such as the distance from the taxi cab to the customer. *Id.* at 1191. The system automatically  
25 sent a text to the customer, however, only if a cab driver pressed a button on a mobile computer in  
26 the cab indicating that he or she had accepted the call and was on the way to pick up the  
27 customer. *Id.* The *Gragg* court held that, as a matter of law, the system did not meet the  
28

1 definition of an ATDS because the plaintiff “submitted no evidence that [defendant’s system] can  
 2 autonomously randomly or sequentially generate numbers to be dialed as required to fulfill the  
 3 statutory definition of an ATDS.” *Id.* at 1193.

4 Similarly, in *Marks*, which also involved automated text messaging, the court followed  
 5 *Gragg* and granted summary judgment for the defendants because the equipment at issue was  
 6 incapable of generating random or sequential numbers. *Marks v. Crunch San Diego*, 2014 WL  
 7 5422976, \*3 (S.D. Cal. Oct. 23, 2014). *Marks* specifically held that the ability to store phone  
 8 numbers in a database and automatically call those numbers is insufficient as a matter of law to  
 9 establish that a system qualifies as an ATDS. *Id.* at \*3; *see also Ibey v. Taco Bell*, 2012 WL  
 10 2401972, \*3 (S.D. Cal. June 18, 2012) (“To constitute an ATDS under the statute, the equipment  
 11 must have the capacity to . . . use a random or sequential number generator to text the numbers.”).

12 Here, the undisputed facts establish that AT&T’s system lacks the capacity to call  
 13 randomly or sequentially generated numbers and cannot reasonably be modified to have the  
 14 requisite capacity. (Torab Decl., ¶¶ 15-17 [Ex. 2 to Smith Decl.].) The only way that cell phone  
 15 numbers can be generated is by a person manually entering the number in the system, and text  
 16 alerts are sent only to phone numbers specified by Digital Life customers. (*Id.* at ¶ 16; *see also*  
 17 *id.* at ¶¶ 9-10, 12-15; Olea Decl., ¶ 11 [Ex. 1 to Smith Decl.]). Indeed, Mr. Spencer has never  
 18 argued that AT&T’s system has the requisite number generation capacity, and his expert witness,  
 19 Randall Snyder, offers no contrary opinion that AT&T’s system has such capacity. (Snyder  
 20 Depo., 100:8-14 [Ex. 13 to Smith Decl.]; *see also id.* at 109:17-110:14; Snyder Decl., ¶ 47 [Ex.  
 21 14 to Smith Decl.].) Hence, no ATDS was used here and, thus, the Court should grant summary  
 22 judgment for AT&T.<sup>4</sup>

## 23 **2. Mr. Spencer Cannot Evade Summary Judgment By Arguing That** 24 **AT&T’s System Dials Numbers Without Human Intervention.**

25 In a 2003 Order, the FCC interpreted the term “ATDS” to include a specific category of  
 26 telemarketing equipment not at issue here called “predictive dialers,” and noted that the basic

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27 <sup>4</sup> The fact that Mr. Spencer may have received a large number of the misdirected texts is  
 28 irrelevant. He still must establish that they were generated by an ATDS or his action fails.

function of predictive dialers is the capacity to dial lists of numbers without “human intervention.”<sup>5</sup> *In the Matter of Rules & Regs. Implementing the TCPA*, 18 F.C.C. Rcd. 14014, 14091, ¶ 132 (July 3, 2003) (“2003 FCC Order”). The FCC briefly reiterated that position in a later 2008 Order which also addressed predictive dialers, citing its earlier 2003 Order. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C. Rcd. 559, 566, ¶ 12 (Jan. 4, 2008) (“2008 FCC Order”).

Some courts have construed the 2003 FCC Order to mean that any equipment that has the capacity to dial numbers without human intervention qualifies as an ATDS, irrespective of whether the equipment can generate random or sequential numbers. Mr. Spencer cannot rely on that interpretation to establish the use of an ATDS here, however, for three reasons. First, the FCC did not eliminate the statutory requirement that to qualify as an ATDS, the equipment must have the capacity to generate random or sequential numbers to be called. Second, even if the term “ATDS” could properly be construed to include any equipment that can dial numbers without human intervention (irrespective of the capacity to generate numbers), AT&T’s system is not an ATDS because it requires human intervention. Third, Mr. Spencer proffers the opinion of Randall Snyder that AT&T’s system is an ATDS because it purportedly dials numbers without human intervention. Mr. Snyder’s opinion cannot create a genuine issue of fact, however, because it is inadmissible legal opinion, he is not an expert on the term “human intervention,” and he acknowledges that Digital Life customers control when and under what circumstances texts are sent, and who receives them.

**a. The FCC Never Eliminated The Statutory Number Generation Capacity Requirement.**

The proposition that the FCC, in its 2003 Order or 2008 Order, purported to broaden the statutory definition of an ATDS by eliminating the random or sequential number generation

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<sup>5</sup> A predictive dialer is equipment that repeatedly calls a phone number until a human voice comes on the line, at which point the call is transferred to a sales agent who can speak to the recipient of the call. *See* 2003 FCC Order, at 14091, ¶ 131. This case does not involve the use of a predictive dialer. (Torab Decl. ¶ 18 [Ex. 2 to Smith Decl.]; Snyder Depo., 98:9-16 [Ex. 13 to Smith Decl.].)

1 requirement fails for three reasons:

2 First, in the FCC Orders relied on by Mr. Spencer, the FCC did not (and of course, could  
3 not) simply ignore the language in Section 227(a)(1) set forth by Congress. In the FCC’s 2003  
4 and 2008 Orders, the FCC responded to arguments that potential defendants should not be liable  
5 under the TCPA if they use a predictive dialer to dial from lists of numbers, rather than actually  
6 utilizing a predictive dialer’s ability to generate random or sequential numbers. *See* 2003 Order,  
7 18 F.C.C. Rcd. at 14091-92, ¶ 130; 2008 Order, 23 F.C.C. Rcd. at 566, ¶ 12. The FCC rejected  
8 that argument because, under Section 227(a)(1), the issue of whether equipment qualifies as an  
9 ATDS does not turn on how the defendant uses the equipment in practice, but instead on whether  
10 the equipment is capable of generating and dialing random or sequential numbers to be called,  
11 even if the defendant does not use the equipment for that purpose. *See* 2003 FCC Order, 18  
12 F.C.C. Rcd. at 14091-92, ¶¶ 131-32. Hence, the FCC reasoned, predictive dialers—which  
13 typically have the ability to call randomly or sequentially generated numbers—meet the  
14 definition of an ATDS, and therefore it is irrelevant if in practice they dial numbers from lists.<sup>6</sup>  
15 *See id.*

16 Second, the notion that the 2003 and 2008 Orders somehow changed the definition of the  
17 term “ATDS” makes no sense in light of other regulations and publications by the FCC, and its  
18 subsequent Orders in 2012 and 2015. As shown above, the definition of an “ATDS” in the FCC’s  
19 implementing regulations copies nearly verbatim the statutory definition of an ATDS. *Compare*  
20 47 C.F.R. § 64.1200(f)(2) *with* 47 U.S.C. § 227(a)(1); *see also Marks*, 2014 WL 5422976 at \*2  
21 (“The FCC itself adheres to . . . the statutory definition of ATDS in [its] regulations”). Although  
22 the FCC has amended other portions of its TCPA-related definitions in recent years, the FCC has  
23 never amended its official definition of an ATDS to eliminate the number generation requirement.

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24  
25 <sup>6</sup> Moreover, it is “well-established,” including in the context of the TCPA, that “repeal or  
26 amendment by implication is disfavored.” *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 340 (2d Cir.  
27 2006). If the FCC had intended to effectuate a significant change in the law by amending the  
28 definition of the term ATDS, it would have said so in its 2003 or 2008 Orders, but it did not. Mr.  
Spencer has never been able to identify any statement by the FCC that it intended to depart from  
the statutory definition of an ATDS.



1 *See, e.g., In the Matter of Rules & Regs. Implementing the TCPA*, 27 F.C.C. Rcd. 1830, at  
 2 Appendix A, \*1862-63 (Feb. 15, 2012) (amending various TCPA-related definitions under 47  
 3 C.F.R. § 64.1200(f)). Likewise, if the FCC had eliminated the number generation requirement in  
 4 its 2003 Order, it would not have told consumers otherwise in its 2014 FCC Consumer Guide.  
 5 (FCC Consumer Guide [Ex. 11 to Smith Decl.] (“[a]utodialers can produce, store and dial  
 6 telephone numbers using a random or sequential number generator.”)).

7 Equally important, to the extent that there was any ambiguity in the FCC’s 2003 and 2008  
 8 Orders before, the ambiguity was eliminated by the FCC’s later 2012 and 2015 Orders, where the  
 9 FCC “emphasized” the importance of the number generation capacity requirement and “affirmed”  
 10 the statutory definition of an ATDS. (*See* Section IV(A)(1) above, p. 12). Moreover, in the  
 11 recent decision in *Dominguez*, the plaintiff made the same “human intervention” argument that  
 12 Mr. Spencer makes here, based on the FCC’s 2003 Order. *Dominguez v. Yahoo, Inc.* 2015 WL  
 13 6405811 at \*1 – Fed. Appx. – (3d. Cir. Oct. 23, 2015). After analyzing the FCC’s 2003 Order  
 14 and recent 2015 Order, however, the Third Circuit stated, “[W]e reject [plaintiff’s] claim that the  
 15 FCC has interpreted the autodialer definition to read out the ‘random or sequential number  
 16 generator’ requirement.” The court held that summary judgment turned on whether the  
 17 defendant’s equipment met the statutory definition of an ATDS, including the random or  
 18 sequential number generator requirement. *Id.* at \*3 n.2.

19 Third, “it is a cardinal principal of statutory construction” that a statute must be construed  
 20 so that “no clause, sentence or word shall be superfluous, void or insignificant.” *TRW Inc. v.*  
 21 *Andrews*, 534 U.S. 19, 31 (2001); *accord Satterfield*, 569 F.3d at 951. Mr. Spencer’s  
 22 interpretation of the term “ATDS” defies this basic principle of statutory construction because it  
 23 effectively nullifies the entire first element of Section 227(a)(1)’s definition of an ATDS (*i.e.*,  
 24 “the capacity (A) to store or produce telephone numbers to be called, using a random or  
 25 sequential number generator”). That fact further supports the conclusion that he is misconstruing  
 26 the FCC’s 2003 and 2008 Orders. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401-02  
 27 (2008) (declining to adopt interpretation of regulation that conflicted with the underlying statute).



**b. Even If The Term “ATDS” Could Be Construed To Apply To Any Equipment That Dials Numbers Without Human Intervention, AT&T’s System Does Not Meet That Definition.**

Even if the term “ATDS” does not require the capacity to generate and call random or sequential numbers, summary judgment is still warranted because two separate levels of human intervention were required to transmit the text alerts at issue.

First, under *McKenna* and *Glauser*, a system is not an ATDS if consumers control whether text messages are sent, when they are sent, or who receives them, because such control qualifies as “human intervention.” *McKenna* involved a software application that, after being downloaded to a customer’s smartphone, offered the customer the option of uploading his or her contacts list and having the system automatically compose and send an invitational text message to people on that list. *McKenna v. WhisperText*, 2015 WL 5264750, \*1 (N.D. Cal. Sept. 9, 2015). Similar to Mr. Spencer here, the plaintiff admitted that the defendant’s system “sends SMS [texts] only at the user’s affirmative direction,” and that admission was sufficient to establish that the system did not qualify as an ATDS, notwithstanding the fact that other aspects of the system were automated. *Id.* at \*2-3. As the court explained, even if the defendant’s system used automated processes to upload numbers and send texts, the fact that the system depended on the WhisperText customer “to set the process in motion” qualified as human intervention. *Id.* at \*3.

Similarly, *Glauser* involved a text messaging application that allowed consumers to create a “group,” and to send text messages to all members of the group at the same time. *Glauser v. GroupMe, Inc.*, 2015 WL 475111, \*1 (N.D. Cal. Feb. 4, 2015). At issue were two “Welcome Texts” that were automatically generated and sent to the group from the defendant’s system. The court granted summary judgment for the defendant because the system sent Welcome Texts only to numbers specified by the consumer who created the group. Hence, “human intervention” was necessary to send the texts despite the fact that consumers who used the application did not draft the automated Welcome Texts or specifically ask GroupMe to send them. *Id.* at \*6.

Here, the undisputed facts establish that the Digital Life text alerts at issue here involve far more user involvement and far less automation than was the case in *McKenna* and *Glauser*, and thus the text alerts here were the result of “human intervention” and are not within the ambit

1 of the TCPA. Specifically, it is undisputed that no text alerts can be sent unless a Digital Life  
2 customer performs all of the following steps:

- 3 • Customers must log onto the online account management tool in order to activate the text  
4 alert feature. (*E.g.*, Opp’n to First MSJ, at 7:25-8:1 [Ex. 18 to Smith Decl.] )
- 5 • Customers must specify the circumstances under which a text alert will be sent, such as  
6 the opening of a door or window. (*E.g.*, *id.* at 11:14-16 (“The type of event that would  
7 result in a . . . text messaging notification was determined solely by the customer . . .”).)
- 8 • Customers must specify which phone number will receive the text alert, and they can  
9 change the number at any time. (*Id.* at 7:25-8:1; Torab Decl. ¶¶ 9-10 [Ex. 2 to Smith  
10 Decl.] )
- 11 • Customers must specify the time and day that the text alerts will be sent. (Torab Decl.  
12 ¶ 11 [Ex. 2 to Smith Decl.] )
- 13 • Customers must name and save a text alert program in the online tool for each type of text  
14 alert they want to receive. (*Id.*)

15 Second, under *Gragg* (described on page 13 above), human intervention also is present  
16 here for the separate and independent reason that each of the text alerts that Mr. Spencer received  
17 was caused by somebody opening the front door or kitchen door in the Digital Life customer’s  
18 home. (Opp’n, at 4:4-5 [Ex. 18 to Smith Decl.] (“the event that caused the text message  
19 notifications to be sent was . . . a door opening”); Spencer Depo., 134:1-7 [Ex. 12 to Smith Decl.];  
20 Olea Decl., ¶ 19 [Ex. 1 to Smith Decl.]; Text Alert Examples [Ex. 5 to Smith Decl.]; Complaint,  
21 ¶15 [Ex. 10 to Smith Decl.] (alleging that the text messages Mr. Spencer received stated either  
22 “Front Door Opened” or “Kitchen Door Opened”).)

23 In *Gragg*, after ruling that the defendant’s system was not an ATDS because it did not  
24 generate random or sequential numbers, the court went on to analyze whether the system  
25 alternatively qualified as an ATDS under the human intervention standard advanced by Mr.  
26 Spencer here. The court concluded that the fact that the system sent a text only when a taxi driver  
27 pressed a button labeled “accept” on a mobile computer established the existence of human  
28 intervention, and granted summary judgment. *See Gragg*, 995 F. Supp. 2d at 1194; *see also*  
*Derby v. AOL, Inc.*, 2015 WL 3477658, \*4 (N.D. Cal. June 1, 2015) (explaining *Gragg*). The  
situation here is very similar: instead of transmitting a text when someone in a cab presses a

1 button marked “accept,” the system transmits a text alert when someone opens a door. Thus,  
 2 even under the broadest possible interpretation of the term “ATDS,” no ATDS was used here.

3 **c. The Opinions Of Randall A. Snyder Do Not Create A Factual**  
 4 **Dispute Concerning The Use Of An ATDS.**

5 In an effort to create a factual question where none exists, Mr. Spencer proffers the  
 6 opinion of Randall Snyder, who takes the extreme position that humans purportedly were not “in  
 7 any way involved” with the creation or sending of the text alerts at issue, and thus the texts were  
 8 sent without “human intervention.” (Snyder Decl., ¶ 47 [Ex. 14 to Smith Decl.]; *see also* Opp’n  
 9 to First MSJ, at 28:11-14 [Ex. 18 to Smith Decl.].) Mr. Snyder’s opinion fails as a matter of law  
 10 to create a factual issue warranting denial of summary judgment for at least four separate reasons:

11 First, as shown in Section IV(A)(1) above (pp. 11-14), the fact that AT&T’s system is  
 12 incapable of random or sequential number generation is the dispositive issue here, and Mr.  
 13 Snyder offers no opinion that AT&T’s system has the requisite number generation capacity.  
 14 (Snyder Depo., 100:8-14; 109:17-110:14 [Ex. 13 to Smith Decl.]; Snyder Decl., ¶ 47 [Ex. 14 to  
 15 Smith Decl.].)

16 Second, Mr. Snyder’s purported expert opinion on the meaning of the term “human  
 17 intervention” is inadmissible legal opinion. *See Hooper v. Lockheed Martin Corp.*, 688 F.3d  
 18 1037, 1052 (9th Cir. 2012) (“matters of law are inappropriate subjects for expert testimony”).

19 Third, Mr. Snyder’s opinion is inadmissible because he admitted that he is not an expert  
 20 on the meaning of the term “human intervention.” (Snyder Depo., 101:17-20 [Ex. 13 to Smith  
 21 Decl.] (“Q: Do you contend that you are an expert on the meaning of the term ‘human  
 22 intervention’ as that term was or is used by the FCC? A: No, . . . ”)); *see also In re Stratosphere*  
 23 *Corp. Secs. Litig.*, 66 F. Supp. 2d 1182, 1189 (D. Nev. 1999) (an expert witness “must be  
 24 qualified to give the proffered testimony”).<sup>7</sup>

25 <sup>7</sup> Mr. Snyder testified that he believes the definition of the term “human intervention” is a  
 26 matter of a “common sense,” making his opinion further inadmissible because matters of  
 27 “common sense” are not proper subjects of expert testimony. (Snyder Depo., 101:20-24 [Doc.  
 28 No. 35-6].); *see* Fed. R. Evid. 702(a) (expert testimony inadmissible unless it conveys “scientific,  
 technical or other specialized knowledge”); *Icicle Seafoods, Inc. v. Khalif*, 2006 WL 5159255, \*1  
 (Continued...)

Fourth, both Mr. Snyder and Mr. Spencer acknowledge that Digital Life customers control whether and under what circumstances texts are sent. (Snyder Depo., 73:13-74:8; 85:24-86:3; 86:17-87:8; 89:11-18; 100:2-10 [Ex. 13 to Smith Decl.]; Opp’n to First MSJ, at 7:25-8:1; 11:14-16 [Ex. 18 to Smith Decl.].) Thus, Mr. Snyder’s opinion that humans are not in any way involved with the text alerts cannot support summary judgment because it contradicts the undisputed facts. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (“when indisputable record facts contradict or otherwise render [expert] opinion unreasonable, it cannot support a jury’s verdict”).

**B. Mr. Spencer’s Claim Fails As A Matter Of Law Because AT&T Did Not Make The Calls At Issue.**

The TCPA imposes liability on the person that “makes” the call. 47 U.S.C. § 227(b)(1)(A)(iii). In its July 10, 2015 Order, the FCC clarified that, irrespective of whether a defendant’s equipment meets the definition of an ATDS, the TCPA generally does not impose liability on companies that provide automated text messaging applications that allow consumers to control “whether” an automated text is sent, “to whom” the text is sent, and “when” the text is sent, because under those circumstances it is the consumer, not the company, who is deemed to have made the call. *See* July 10, 2015 Order, ¶¶ 25, 37; *see also id.* at ¶¶ 26-36. This holds true even if the company has some control over the content of the text messages, provided that the content is not related to telemarketing. *Id.* at ¶ 37. As the FCC explained, text messaging applications that give consumers control over automated text messages differ from the “non-consensual calling campaigns” that the TCPA was designed to regulate. *Id.* at ¶ 32.

In the recent decision of *McKenna* (described on page 18 above), the court followed the FCC’s July 10, 2015 Order and held that the fact that customers controlled whether and to whom texts were sent not only established lack of an ATDS, but also that the defendant was not the person who “made” call under the TCPA. *McKenna*, 2015 WL 5264750 at \*4-5. *McKenna* held

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(W.D. Wash. 2006) (excluding expert testimony because expert conceded that his opinion was based on “common sense”).

1 that the fact that the defendant used “automated processes to harvest and upload a user’s selected  
 2 phone numbers and then send [text] messages” was insufficient as a matter of law to establish that  
 3 the defendant made the call. *Id.* at \*5. Hence, the FCC’s July 10, 2015 Order and *McKenna*  
 4 further support dismissal of Mr. Spencer’s claim because (as shown on pages 19 above) it is  
 5 undisputed that Digital Life customers—not AT&T—control when and under what circumstances  
 6 text alerts are sent, and who receives them.<sup>8</sup> (*See, e.g.,* Opp’n to First MSJ, at 7:25-8:1; 11:14-16  
 7 [Ex. 18 to Smith Decl.]; Torab Decl., ¶¶ 3, 6-15 [Ex. 2 to Smith Decl.].)

8 **C. Mr. Spencer’s Claim Fails As A Matter Of Law Because The Text Alerts He**  
 9 **Received Fall Within The TCPA’s Broad “Emergency Purposes” Exception.**

10 Section 227(b)(1)(A)(iii) of the TCPA prohibits making “any call (other than a call made  
 11 for emergency purposes or made with the prior express consent of the called party) using any  
 12 automatic telephone dialing system or an artificial or prerecorded voice . . . (iii) to any . . .  
 13 cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). Thus, on its face,  
 14 the TCPA permits calls and text messages made for “emergency purposes.”<sup>9</sup> § 227(b)(1)(A); *see*  
 15 *also Grant v. Capital Mgmt. Servs., L.P.*, 449 Fed. Appx. 598, 600 n.1 (9th Cir 2011) (“Calls  
 16 otherwise in violation of the TCPA are not unlawful if made for emergency purposes . . .”). The  
 17 undisputed facts establish that the Digital Life text alerts that Mr. Spencer received are not  
 18 actionable because they are subject to the emergency purposes exception.

19 First, the text alerts fall within the broad regulatory definition of the term “emergency  
 20 purposes.” Congress delegated authority to the FCC to define the term “emergency purposes.”  
 21 137 Cong. Rec. S18781-02, 1991 WL 252592, at \*18784 (Nov. 27, 1991) (“The FCC must  
 22 determine what constitutes an emergency purpose”). Under FCC-promulgated regulations, “the  
 23

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24 <sup>8</sup> In opposing AT&T’s first motion for summary judgment, Mr. Spencer argued that  
 25 AT&T necessarily “made” the calls because its system sent the text alerts at issue. That argument  
 26 fails in light of *McKenna*, where, as explained above, the court held that the defendant did not  
 “make” the calls notwithstanding the fact that its system sent the texts at issue. *McKenna*, 2015  
 WL 5264750 at \*4-5.

27 <sup>9</sup> Text messages are considered “calls” within the meaning of the TCPA. *Satterfield*, 569  
 28 F.3d at 952.

term ‘emergency purposes’ means calls made necessary in any situation affecting the health and safety of consumers.” 47 C.F.R. § 64.1200(f)(4). The FCC has explained that “the legislative history of the TCPA indicates a congressional intent to interpret the term ‘emergency’ broadly rather than narrowly.” *In the Matter of the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 2736, 2738, ¶ 17 (April 17, 1992) (“April 1992 Order”). The exception applies in any situation where “it is in the public interest to convey information to consumers concerning health or safety, whether or not the event was anticipated or could have been anticipated.” *Id.*

Consistent with this broad interpretation, text messages may fall within the “emergency purposes” exception even if they are sent to a single individual rather than the public at large, and regardless of whether there is imminent peril to health or safety. For example, automated notifications warning of possible power outages due to delinquent electricity bills or scheduled utility maintenance fall under the exception, because the resulting outages can potentially affect an individual’s safety. *Id.* (scheduled utility maintenance notifications fall under the “emergency purposes” exception); 137 Cong. Rec. H. 11307, 11310 (Nov. 26, 1991) (same); *see In the Matter of Rules & Regs. Implementing the TCPA*, 7 F.C.C. Rcd. 8752, 8777-78, ¶¶ 49-51 (Oct. 16, 1992) (service interruption notifications, including those caused by delinquent utility bills, concern potentially hazardous conditions falling within the “emergency purposes” exception).<sup>10</sup>

Here, by its very nature, a home-security system alert is a situation affecting the “safety of consumers.” 47 C.F.R. § 64.1200(f)(4). The safety purpose of the text alerts at issue here is confirmed by each of the following undisputed facts:

- The Digital Life Service is a home intrusion and monitoring service, and all of the text alerts that Mr. Spencer received were sent in connection with that service. (*E.g.*, Opp’n to First MSJ, at 6:25-28 [Ex. 18 to Smith Decl.]; Olea Decl., at ¶¶ 4-11, 14-19 [Ex. 1 to Smith Decl.]; FAC, ¶¶ 8, 11-13, and Exs. 1-2 to FAC [Ex. 10 to Smith Decl.].)
- The Digital Life home intrusion and monitoring services are referred to as “Life Safety

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<sup>10</sup> Mr. Spencer previously argued that the emergency purposes exception is “narrow” and only applies where there is an “actual” and “significant” event involving the police or fire departments. That interpretation, however, is contrary to the FCC’s instruction that the exception must be construed broadly and may apply to more mundane matters such as planned utility outages, and Mr. Spencer cited no authority supporting his narrow interpretation.



Services,” and AT&T’s website emphasizes the “safety and security features” of Digital Life. (Olea Decl., ¶¶ 6-7 [Ex. 1 to Smith Decl.]; Digital Life User Guide, at p. 1 (ATT000016) [Ex. 3 to Smith Decl.]; Digital Life website screenshots (ATT000079) [Ex. 4 to Smith Decl.]; *see also id.* at ATT000078 (“One app integrates home security and automation to help keep you safe . . .”).)

- The only purpose of the text alerts that Mr. Spencer received was to warn a Digital Life customer that the front door or kitchen door of her home had been opened. (*E.g.*, Opp’n to First MSJ, at 10:28-11:1 [Ex. 18 to Smith Decl.] (“the [text] messages at issue did nothing more than notify Defendant’s customer that a kitchen door was opened or that the front door was opened.”); Spencer Depo., 134:1-7 [Ex. 12 to Smith Decl.]; Example Text Alerts [Ex. 5 to Smith Decl.]
- Mr. Spencer’s expert witness repeatedly stated that the text alerts Mr. Spencer received warned of “security” events, and were designed “only communicate the result of something that occurred as a breach of security in the house.” (Snyder Depo., at 89:6-7 [Ex. 13 to Smith Decl.]; Snyder Decl., at ¶¶ 27, 29, 43 [Ex. 14 to Smith Decl.].)

Second, the Court may properly look to the purpose of the TCPA when construing the term “emergency purposes.” *See Satterfield*, 569 F.3d at 954 (examining the purpose of the TCPA when construing the word “call”); *Ryabyschuck v. Citibank (S. Dakota) N.A.*, 2012 WL 5379143, \*2 (S.D. Cal. Oct. 30, 2012) (courts “consistently and properly look to the purpose and history of the statute” when construing the TCPA). Courts must approach the question of whether a call or text falls within the intended scope of the TCPA “with a measure of common sense.” *Chesbro v. Best Buy Stores*, 705 F.3d 913, 918 (9th Cir. 2012). “[C]ontext is indisputably relevant to determining whether a particular call is actionable under the TCPA.” *Ryabyschuck*, 2012 WL 5379143, at \*3. These principles further support the conclusion that home security alerts like those at issue here were not intended to be regulated by the TCPA, and fall within the broad “emergency purposes” exception.

As explained by the Ninth Circuit and other courts across the country, the TCPA was enacted to prevent abusive telemarketing practices. *See, e.g., Satterfield*, 569 F.3d at 954 (“TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls”); *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199 WV/KY/OH*, 708 F.3d 737, 741 (6th Cir. 2013) (“The TCPA thus seeks to curb abusive telemarketing practices that threaten the privacy of consumers and businesses”). As further

1 explained by the FCC, however, “there are many valuable uses for auto dialer messaging” that are  
 2 unrelated to telemarketing and that Congress did not intend to prohibit when it enacted the TCPA.  
 3 April 1992 Order, 7 F.C.C. Rcd. at 2737, ¶ 9.

4 This case has nothing to do with telemarketing, and the text alerts that Mr. Spencer  
 5 received were not the result of a mass telemarketing campaign promoting products or services to  
 6 consumers. (Olea Decl., ¶¶ 12, 19 [Ex. 1 to Smith Decl.]; *see also* Text Alert Examples [Ex. 5 to  
 7 Smith Decl.]. Indeed, far from “abusive telemarketing” targeted by the TCPA, the value and  
 8 utility of the Digital Life text alerts are confirmed by the success of the Digital Life service and  
 9 the popularity of the text alert feature among Digital Life customers. (Olea Decl., ¶ 13 [Ex. 1 to  
 10 Smith Decl.].) Given the broad reach of the “emergency purposes” exception, the texts at issue  
 11 here do not fall within the prohibitions of the TCPA.<sup>11</sup>

## 12 V. CONCLUSION

13 For the foregoing reasons, Defendant AT&T respectfully asks that the Court grant its  
 14 Motion for Summary Judgment and dismiss Mr. Spencer’s First Amended Complaint with  
 15 prejudice.

16 Dated: November 25, 2015

/s/

Joel D. Smith

17  
18  
19  
20 <sup>11</sup> In his opposition to this motion, Mr. Spencer will likely emphasize that he allegedly  
 21 received approximately 2,100 text alerts after complaining about them, but that fact is irrelevant  
 22 to the “emergency purposes” exception. It is undisputed that the only purpose of the Digital Life  
 23 text alerts was to provide home security alerts. That purpose does not change depending on who  
 24 received the text alerts, and the statute does not make a distinction for emergency calls or texts  
 25 sent to the wrong person. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Moreover, given the undisputed  
 26 purpose of the text alerts, it would have been potentially unsafe for AT&T to discontinue them at  
 27 Mr. Spencer’s request without first identifying the potentially-affected Digital Life customer and  
 28 confirming the legitimacy of the request. (Olea Depo., 60:12-61:2 [Ex. 16 to Smith Decl.].) Indeed, Mr. Spencer agreed that if he had a home security system, he would not want his home security company to shut it down at the request of a stranger without clearing it with him first. (Spencer Depo., 107:9-20 [Ex. 12 to Smith Decl.].) And, as Mr. Spencer’s testimony shows, the particular phone he used here was seldom used for any purpose other than to gather misdirected calls and texts. (Spencer Depo., 80:11-15 [Ex. 12 to Smith Decl.].)



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**CERTIFICATE OF SERVICE**

I, Joel D. Smith, state:

My business address is 275 Battery Street, 23rd Floor, San Francisco, California 94111. I am over the age of eighteen years and not a party to this action.

On the date set forth below, I served via electronic service the foregoing document(s) described as:

**DEFENDANT AT&T DIGITAL LIFE INC.'S SECOND  
MOTION FOR SUMMARY JUDGMENT**

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